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Nos. 82-626, 82-616 and 82-608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JACQUELINE N. RAU,
Cross-Petitioner,

v.

SHIRLEY STOVER, *et al.*,
Cross-Respondents.

MELANIE HANSON JOHNSON,
GERARD STANLEY JOHNSON, *et al.*,
Cross-Petitioners,

v.

SHIRLEY STOVER, *et al.*,
Cross-Respondents.

CROWN CENTER REDEVELOPMENT CORPORATION and
HALLMARK CARDS, INCORPORATED,
Cross-Petitioners,

v.

SHIRLEY STOVER, *et al.*,
Cross-Respondents.

On Cross-Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION

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with respect to all matters pertaining to class certification,

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QUESTIONS PRESENTED

1. Should this Court review the District Court's findings that certification of a class action was appropriate despite the facts that a) no issues raised by petitioners meet the standard for review on certiorari; and b) the Eighth Circuit did not see the need to disturb or even address the District Court's decision on those issues?

2. Should this Court review the Eighth Circuit's decision that the District Court was not required to disqualify itself despite the facts that a) no issues raised by petitioners meet the standard for review on certiorari; and b) the Eighth Circuit applied the correct standard in its decision?

LIST OF PARTIES

Parties to the proceedings in the Eighth Circuit were: Shirley Stover and all other class members similarly situated *†; The Honorable Scott D. Wright, United States District Court Judge for the Western District of Missouri †; Jacqueline N. Rau *; Melanie Hanson Johnson, Gerard Stanley Johnson, and other state court plaintiffs similarly situated.†

Crown Center Redevelopment Corp., Hallmark Cards, Inc., Hyatt Corp. and Hyatt Hotels Corp., and the Plaintiffs' Liaison Committee participated as *amici curiae*.

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* Party to No. 82-1207, Appeal of Jacqueline N. Rau.

† Party to No. 82-1181, Petition for Mandamus of Melanie Hanson Johnson and Gerard Stanley Johnson, *et al.*

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IN THE

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OCTOBER TERM, 1982

No. 82-626

JACQUELINE N. RAU,
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SHIRLEY STOVER, *et al.*,
Cross-Respondents.

No. 82-616

MELANIE HANSON JOHNSON,
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SHIRLEY STOVER, *et al.*,
Cross-Respondents.

On Cross-Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION

Respondents, Shirley Stover and the class of all business invitees present at the Kansas City Hyatt Regency Hotel disaster on July 17, 1981, pray that this Court deny the conditional cross-petitions of Crown Center Redevelopment Corporation and Hallmark Cards, Inc., No. 82-608, Jacqueline N. Rau, No. 82-626, and Melanie Hanson Johnson and Gerard Stanley Johnson, *et al.*, No. 82-616, for writs of certiorari to the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

Respondents respectfully refer this Court to the statement of the case set forth in the petition for certiorari filed in *Shirley Stover, et al.* v. *Melanie Hanson Johnson, Gerard Stanley Johnson, et al., and Jacqueline N. Rau*, No. 82-217.

REASONS FOR DENYING THE WRIT

Cross-petitioners have requested that their cross-petitions for certiorari be granted if certiorari is granted in *Shirley Stover* v. *Melanie Hanson Johnson, Gerard Stanley Johnson, et al., and Jacqueline N. Rau*, No. 82-217. Respondents oppose those cross-petitions herein.

Contrary to cross-petitioners' assertions, there is no need for this Court to grant any cross-petition in this case should certiorari be granted in No. 82-217.

Cross-petitioners have raised no issue worthy of review by this Court. They do not even attempt to demonstrate that they satisfy the standards set forth in Rule 17 of the Rules of this Court governing review on certiorari.[1] Indeed, cross-petitioner Rau concedes this in her petition. Rau Cross-Petition at 13.

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[1] The relevant portions of the Rule state:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way

Far from promoting judicial economy, review by this Court of issues which do not meet the standards of Rule 17 is a waste of this Court's scarce judicial resources.

The issue of whether the class certification was proper is completely separable from, and bears no relation to, the questions whether the certification order constituted an injunction and whether that injunction violated the Anti-Injunction Act. This Court need not consider the factual issues raised in the cross-petitions in order to review the decision of the Eighth Circuit.

Finally, there is no question that the District Court did not abuse its discretion in certifying the class and that the Eighth Circuit properly held that the District Court was not required to disqualify itself.

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in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

ARGUMENT

I. THE CLAIM THAT THE DISTRICT COURT IMPROPERLY CERTIFIED A CLASS UNDER FED. R. CIV. P. 23 DOES NOT RAISE ANY ISSUE WORTHY OF REVIEW BY THIS COURT.

A. There is no Reason for this Court to Decide Whether the District Court's Certification Order was Appropriate under Fed. R. Civ. P. 23.

The short answer to the cross-petitions challenging the propriety of the District Court's class certification order is that the cross-petitioners have no standing to raise these issues, as they do not seek review of any ruling of the Eighth Circuit adverse to them. A successful party has no standing to seek review of a judgment entirely in his favor. *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645 (1934) (per curiam); *Lindheimer* v. *Illinois Telephone Co.*, 292 U.S. 151, 176 (1934); *Public Service Commission* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206-07 (1939).[2]

The issues upon which cross-petitioners seek review, although fully briefed by the parties before the Eighth Circuit, were not addressed by that court in its decision. Indeed, far from finding fault with the District Court's certification order under Fed. R. Civ. P. 23, the Eighth Circuit commended Judge Wright on his "carefully reasoned" order and on his "creative efforts in attempting to achieve a fair, efficient and economical trial for the victims of the Hyatt Regency disaster." Pet. A. 17a-18a.

Given that the Eighth Circuit clearly felt that the District Court's certification was proper under Fed. R. Civ. P.

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[2] There is a question whether cross-petitioners Crown Center Redevelopment Corp. and Hallmark Cards, Inc. have standing for a second reason. Although they have chosen to designate themselves as respondents in No. 82-217 and petitioners here, the Eighth Circuit denominated them as *amici curiae*. Pet. A. 2a n.3. (References to "Pet." and "Pet. A." are to the petition for a writ of certiorari in No. 82-217 and the appendix attached thereto).

23 and did not need correcting, although it had ample opportunity to do so, there is no need for this Court to consider the issue anew.

B. The District Court's Certification Order was Proper under Fed. R. Civ. P. 23.

The District Court's order cannot be vacated unless its certification of the class action constituted an abuse of discretion. *See*, e.g., *Rule* v. *International Association of Bridge, Structural & Ornamental Ironworkers, Local Union No. 396*, 568 F.2d 558, 563 (8th Cir. 1978). It did not.

First, the District Court's certification of a Rule 23 (b) (1) (A) class on the issues of compensatory and punitive liability was well within its discretion. See, *e.g.*, *Hernandez* v. *The Motor Vessel Skyward*, 61 F.R.D. 558, 561 n.8, 562 (S.D. Fla. 1973) *aff'd. mem.*, 507 F.2d 1278 (5th Cir. 1975); *Berman* v. *Narragansett Racing Association*, 48 F.R.D. 333, 337 (D.R.I. 1969); *Coburn* v. *4-R Corp.*, 77 F.R.D. 43, 46 (E.D. Ky. 1977).

Second, the certification of a class under Rule 23(b) (1) (B) on the issues of punitive liability and punitive damages was appropriate. Cross-petitioners do not and cannot claim that they satisfy Supreme Court Rule 17 on this issue. Not only is there no split among the circuit courts, but the Eighth Circuit did not render a decision on this issue.

Third, with respect to cross-petitioners' claims that a class action is inappropriate for mass tort cases, the Eighth Circuit, when commending the District Court for its efforts to achieve a "fair, efficient, and economical trial," Pet. A. 18a noted "that several commentators, including Professors Moore, Wright and Miller, also maintain that class actions are particularly appropriate for disposing of mass accident litigation." Pet. A. 18a-n.14.[3]

[3] The authorities cited by cross-petitioners provided no support for their broad assertions. The Advisory Committee Note to Rule 23(b)(3), on which petitioner Rau relies, by its own terms addresses

A class action provides the most effective—and perhaps only—method of ensuring that any recovery will be distributed equitably among all people injured in a mass disaster.

Cross-petitioners lastly claim that the District Court erred in not permitting them to "explore" the class representative's adequacy. The decision whether to allow discovery concerning the class representative is well within the clear discretion of the District Court. *See, e.g., Kamm* v. *California City Development Co.*, 509 F.2d 205, 209 (9th Cir. 1975); *Pearlman* v. *Gennaro*, 17 Fed. R. Serv. 2d 666, 670 (S.D.N.Y. 1973).[4] This issue was raised by cross-petitioners and ignored by the Eighth Circuit. It does not meet the standards of Supreme Court Rule 17 and is not worthy of review by this Court.

C. Certification of a Mandatory Class does not Violate Due Process.

Cross-petitioner Rau offers the theory that the District Court's certification of a mandatory class violates a class member's due process right to opt out of a class. This proposition is not supported by any of the cases cited

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the "ordinar[y]" mass accident in which there is "the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways." Fed. R. Civ. P. 23 Advisory Committee Note, 39 F.R.D. 98, 103 (1965). Here, there are *no* issues of liability or defenses to liability affecting class members in different ways. Each victim stands in the same position with respect to every issue save that of compensatory damages, which would not be tried in the class action. Those distinctions, among others, separate the Ninth Circuit's decision in *In Re: Northern District of California, Dalkon Shield IUD Products Liability Litigation*, Nos. 81-4648 *et al.* (9th Cir. June 18, 1982; amended July 15, 1982) from the case at hand. *See* Pet. at 12 n.15.

[4] With respect to the claim that there is no adequate class representative, *see* Petitioners' Reply to Respondents' Briefs In Opposition to the Petition for Certiorari in No. 82-217 at 7.

by the cross-petitioner. Nor is any support offered from any other authority. Indeed, the cases are legion which state that there is no right, constitutional or otherwise, for a class member to opt out of a mandatory class.[5]

II. THE CLAIM THAT THE EIGHTH CIRCUIT ERRED IN REFUSING TO DISQUALIFY THE DISTRICT COURT JUDGE DOES NOT RAISE ANY ISSUE WORTHY OF REVIEW BY THIS COURT.

Ignoring the standards of Supreme Court Rule 17, cross-petitioner Rau seeks review of her claim that the Eighth Circuit ignored the proper standard of review in its holding that District Court Judge Wright was not required to disqualify himself. The frivolity of the claim is apparent from a reading of the majority opinion. The Eighth Circuit clearly stated that after a careful review of the record, it had concluded "that Judge Wright did not abuse his discretion in refusing to disqualify himself." Pet. A. 16a-18a. This has always been the standard for review of disqualification rulings, and the Eighth Circuit clearly adhered to it.[6]

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[5] *Dosier* v. *Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981); *Kincade* v. *General Tire and Rubber Corp.*, 635 F.2d 501, 506-07 (5th Cir. 1981); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1182, n.27 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Wetsel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239, 252-53 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Burwell* v. *Eastern Airlines, Inc.*, 63 F.R.D. 495, 499-500 (E.D. Va. 1975); *Van Gemert* v. *Boeing Co.*, 259 F. Supp. 125, 130 (S.D.N.Y. 1966).

[6] Cross-petitioner Rau's interpretation of statements made by Judge Wright at a recent hearing, Rau Cross-Petition at 19, is not only improperly raised before this Court and irrelevant to the issues before it, but is also highly inaccurate. If cross-petitioner intends to make serious charges concerning a federal district judge's ethical conduct, it is a matter of the most fundamental good faith that the transcript be provided to substantiate such charges.

CONCLUSION

Respondents respectfully request that the conditional cross-petitions for writs of certiorari in Nos. 82-626, 82-616, and 82-608, be denied.

Respectfully submitted,

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